

FACTUAL HISTORY

Appellant, then a 47-year-old clerk, filed an occupational disease claim on January 11, 2004. He stopped work on December 19, 2003. OWCP accepted cervical disc displacement at C3-4 and C5-6 and authorized cervical discectomy and fusion surgery on August 30, 2005. Appellant received compensation benefits. After a brief return to work in November 2005, he sustained a recurrence of disability and was placed on the periodic rolls.

On May 10, 2013 the employing establishment offered appellant a modified position as a custodial laborer for four hours daily.² It indicated that the position was based on a November 5, 2012 report from Dr. Robert J. Wilson, an attending physician who is Board-certified in physical medicine, rehabilitation, and pain medicine, who provided permanent restrictions with physical activity limited to four hours a day and occasional lifting to 15 pounds.

By letter dated July 3, 2013, OWCP advised appellant that the offered custodial position was suitable and provided him 30 days to either accept the position or to provide an explanation for his refusal. It further notified appellant of the penalties for refusing suitable work under section § 8106(c) of FECA.³

In response, on July 22, 2013 appellant submitted a May 14, 2013 report in which Dr. Wilson noted reviewing the duties of the position offered appellant and found that “all information really I think relates to quite a lot of repetitive bending and twisting activities. Clearly stated I did not want him to do any repetitive lifting, bending, [or] twisting activities as per his disability issues addressed November 15, 2012. I believe these issues spell out clearly his physical capabilities. I believe these issues are permanent as it relates to disability and would recommend no more than three to four hours per day activities with 10- to 15-minute breaks each hour.”

On August 5, 2013 OWCP ascertained that appellant had not returned to work and that the offered position remained available. By decision dated August 13, 2013, it terminated appellant’s wage-loss compensation on the basis that he refused an offer of suitable work under section 8106(c). OWCP noted that appellant had not responded to the 30-day letter.

Appellant timely requested a hearing that was held on February 18, 2014. At the hearing appellant’s attorney argued that OWCP committed procedural error by not considering the evidence sent in response to the 30-day letter. In a May 5, 2014 decision, an OWCP hearing representative affirmed the August 13, 2013 decision, finding that appellant could work within certain medical restrictions four hours per day.

² The position was effective “estimated June 1, 2013.” The duties included sweeping and mopping floors, occasionally emptying trash receptacles weighing less than 15 pounds, washing counters and table tops, dusting, vacuuming rugs, cleaning blinds, and washing glass doors and windows. The physical requirements were intermittent walking, standing, pushing, pulling and lifting of no more than 15 pounds, and 10- to 15-minute breaks each hour were provided.

³ 5 U.S.C. § 8106(c).

LEGAL PRECEDENT

Section 8106(c) of FECA provides in pertinent part: “A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation.”⁴ It is OWCP’s burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.⁵ The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.⁶

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.⁷ In determining what constitutes “suitable work” for a particular disabled employee, OWCP considers the employee’s current physical limitations, whether the work is available within the employee’s demonstrated commuting area, the employee’s qualifications to perform such work, and other relevant factors.⁸ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.⁹ OWCP procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.¹⁰

When OWCP considers a job to be suitable, it shall advise the employee of its finding and afford him or her 30 days to either accept the job or present any reasons to counter OWCP’s finding of suitability.¹¹ If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and further inform the employee that he has 15 days within which to accept the offered work without penalty.¹² After providing the 30-day and 15-day notices, OWCP will terminate the employee’s entitlement to

⁴ *Id.*

⁵ *Joyce M. Doll*, 53 ECAB 790 (2002).

⁶ 20 C.F.R. § 10.517(a).

⁷ *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff’d on recon.*, 43 ECAB 818 (1992).

⁸ 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

⁹ *Gayle Harris*, 52 ECAB 319 (2001).

¹⁰ Federal (FECA) Procedure Manual, Part -- 2 Claims, *Reemployment: Determining Wage-Earning Capacity, Refusal of Job Offer*, Chapter 2.814.5 (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

¹¹ 20 C.F.R. § 10.516.

¹² *Id.*

further wage-loss compensation and schedule award benefits.¹³ The employee, however, remains entitled to medical benefits.¹⁴

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits as it did not comply with its own procedural requirements. As noted above, OWCP regulations and procedures and Board precedent provide that OWCP must inform the employee of the consequences of refusing suitable work and allow him an opportunity to provide reasons for declining the offered position.¹⁵ If the employee presents reasons for refusing the offered position, OWCP must inform him if it finds the reasons inadequate to justify the refusal of the offered position and afford the employee a final opportunity to accept the position.¹⁶

Following receipt of the medical report from Dr. Wilson, who explained his opinion on the position offered, OWCP terminated appellant's wage-loss benefits on August 13, 2013 without advising him that the medical report was an insufficient basis upon which to refuse the position and that he had 15 days to accept the job offer without penalty.

As asserted on appeal, the Board noted in the case *Maxine D. Riggs*,¹⁷ as in the instant case, that while claimant did not either accept or reject the offered position, she had submitted a medical report from her physician which stated that the claimant continued to have difficulties with her back with radiation of pain to her lower right extremity. The Board found that, under current OWCP procedures, she was entitled to be notified that the report from her physician did not constitute good reasons for refusing the position. In addition, she was entitled to a reasonable amount of time to accept the job offer or face termination of benefits.

In this case, as in *Riggs*,¹⁸ appellant submitted a medical report in response to the 30-day OWCP letter. In issuing the August 13, 2013 decision, OWCP implicitly determined that the evidence submitted by appellant in support of his refusal to accept the offered position was unacceptable and in doing so, finalized its preliminary decision on suitability under section 8106(c), thereby denying appellant an opportunity to accept the position.¹⁹ The Board finds that OWCP did not comply with the proper notice requirements prior to termination. Thus, under the facts of this case, OWCP committed error in its invocation of section 8106(c) and improperly

¹³ *Id.* at § 10.517(b).

¹⁴ *Id.*

¹⁵ *Id.* at §§ 10.516-10.517; Federal (FECA) Procedure Manual, *supra* note 10; *see also Maggie L. Moore*, *supra* note 7.

¹⁶ *Id.*

¹⁷ Docket No. 96-228 (issued November 10, 1997).

¹⁸ *Id.*

¹⁹ *See A.W.*, Docket No. 13-1738 (issued December 17, 2013).

terminated appellant's compensation effective August 13, 2013 on the grounds that he refused suitable work.²⁰

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits, effective August 13, 2013, pursuant to 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 5, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

²⁰ See *A.H.*, Docket No. 13-686 (issued June 15, 2013).